Raymond Cheah Choon Sing v Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(W)-402–12 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
13 JULY 2017

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Tort — Breach of statutory duty — Proceedings against government — Appellant fell into potholes while riding motorcycle and sustained injuries — Appellant filed claim against respondents — Whether respondents liable in negligence for their failure to keep road which was under their maintenance in good repair pursuant to s 7(3) of the Government Proceedings Act 1956 — Whether respondents in breach of statutory duty

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Tort — Negligence — Local authority — Appellant fell into potholes while riding motorcycle and sustained injuries — Appellant filed claim against respondents — Whether respondents liable in negligence for their failure to keep road which was under their maintenance in good repair pursuant to s 7(3) of the Government Proceedings Act 1956 — Government Proceedings Act 1956 ss 5 & 7

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On 2 September 2009, the appellant was riding his motorcycle along Jalan Perusahaan, Bukit Minyak, Pulau Pinang when he suddenly fell into two contiguous potholes. The appellant was thrown off his motorcycle and sustained injuries. The appellant then filed a claim against the respondents but the claim was dismissed by the magistrate. The appellant's appeal to the High Court was also dismissed by the learned judicial commissioner ('the JC'). The learned JC found that: (a) the appellant failed to prove that the respondents were negligent within the perimeters of s 7(3) of the Government Proceedings Act 1956 ('the Act'); and (b) the respondents were protected under s 7(1) of the Act for any omission or refusal to maintain the road which was in a state of disrepair due to the two potholes. Aggrieved by the decision, the appellant filed the present appeal. The issue for the court's determination was whether the respondents were liable in negligence for their failure to keep a road known as Jalan Perusahaan which was under their maintenance in good repair pursuant to s 7(3) of the Act.

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Held, allowing the appeal with costs:

(1) Based on s 7 of the Act, the maintenance of public roads was one of the public duties of the respondents. As it was not disputed that the road in

question was under the care and maintenance of the respondents, it followed that the respondents were under a public duty to maintain the public road in question within the meaning of s 7(2) of the Act. The maintenance of public roads was the respondents' statutory duty (see para 17).

(2) In the present case, the action by the appellant against the respondents was for negligence and not for breach of contract. The respondent could not rely on s 7(1) of the Act to argue that no proceedings should lay against them on account of their act or omission in the exercise of their public duties (see para 18).

(3) On a plain reading of s 7(3) of the Act, it was clear that the words 'construction' and 'maintenance' contained in the phrase 'in the execution of any works of construction or maintenance' was disjunctive. Further, the maintenance of public roads included the regular inspection of public roads and the act of carrying out timeous and prompt repair and maintenance works to keep the public roads in good repair and condition. It followed that where as in this case, notwithstanding the respondents' knowledge of the existence of the potholes the respondents failed to promptly repair the potholes and thereby left the public road in a state of disrepair. As such, the respondents in failing to maintain the public road in question had failed to discharge their statutory duty under s 7(2) of the Act (see paras 21 & 23).

(4) The first requirement of the tort of negligence was the existence in law of a duty of care situation, ie one in which the law attached liability to carelessness. This requirement had been clearly satisfied pursuant to ss 5 and 7(2) of the Act which imposed a statutory duty of care on the respondents. The second requirement was that there must be careless behaviour by the respondents. The third requirement was that there must be a causal connection between the respondents' careless conduct or neglect and the damage. And the fourth requirement was the element of foreseeability that such conduct or neglect would have inflicted on the appellant the kind of damage of where he complained. The second to the fourth requirements were questions of fact, which on the undisputed facts and evidence were satisfied on the balance of probabilities. In totality, the respondents were negligent in failing to carry out timeous repair to the potholes despite having prior knowledge of the same, and which said act of neglect led to the appellant falling into the potholes and thereby sustained loss and damage (see paras 29–30).

[Bahasa Malaysia summary

Pada 2 September 2009, perayu menunggang motosikalnya di sepanjang Jalan Perusahaan, Bukit Minyak, Pulau Pinang apabila tiba-tiba dia jatuh ke dalam dua lubang bersebelahan. Perayu tercampak jatuh dari motosikalnya dan

mengalami kecederaan. Perayu kemudiannya memfailkan tuntutan terhadap responden-responden tetapi tuntutan ditolak oleh majistret. Rayuan perayu kepada Mahkamah Tinggi juga ditolak oleh pesuruhjaya kehakiman yang bijaksana ('PK'). PK yang bijaksana mendapati bahawa: (a) perayu gagal untuk membuktikan bahawa responden-responden adalah cuai dalam perimeter s 7(3) Akta Prosiding Kerajaan 1956 ('Akta'); dan (b) responden-responden adalah dilindungi di bawah s 7(1) Akta untuk mana-mana ketinggalan atau keengganan untuk menyelenggara jalan yang mana dalam keadaan rosak akibat daripada dua lubang tersebut. Tidak puas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu untuk penentuan mahkamah adalah sama ada responden-responden bertanggungjawab dalam kecuaian kerana kegagalan mereka untuk memastikan jalan yang dikenali sebagai Jalan Perusahaan yang mana adalah di bawah penyelenggaraan mereka berada di dalam keadaan baik berikutan s 7(3) Akta.

Diputuskan, membenarkan rayuan dengan kos:

(1) Berdasarkan s 7 Akta, penyelenggaraan jalan-jalan awam adalah satu daripada tugas awam responden-responden. Memandangkan ia tidak dipertikaikan bahawa jalan yang dipersoalkan adalah di bawah jagaan dan penyelenggaraan responden-responden, oleh itu responden-responden adalah di bawah tugas awam untuk menyelenggara jalan awam yang dipersoalkan dalam maksud s 7(2) Akta. Penyelenggaraan jalan awam adalah tugas statutori responden-responden (lihat perenggan 17).

(2) Dalam kes ini, tindakan oleh perayu terhadap responden-responden adalah untuk kecuaian dan bukan bagi pelanggaran kontrak. Responden-responden tidak dapat bergantung ke atas s 7(1) Akta untuk berhujah bahawa tiada prosiding patut dibuat terhadap mereka atas perbuatan atau peninggalan mereka di dalam menjalankan tugas-tugas awam mereka (lihat perenggan 18).

(3) Atas bacaan biasa s 7(3) Akta, ia adalah jelas bahawa perkataan-perkataan 'construction' dan 'maintenance' yang terkandung di dalam frasa 'in the execution of any works of construction or maintenance' adalah penyarak. Selanjutnya, penyelenggaraan jalan-jalan awam termasuk pemeriksaan tetap jalan-jalan awam dan tindakan kerja-kerja pembaikan dan penyelenggaraan dengan cepat dan segera untuk memastikan jalan-jalan awam dalam keadaan baik. Berikutan itu seperti dalam kes ini, walau apa pun pengetahuan responden-responden terhadap kewujudan lubang-lubang tersebut responden-responden gagal untuk dengan segera membaiki lubang-lubang dan oleh itu membiarkan jalan awam tersebut dalam keadaan tidak baik. Dalam kegagalan untuk menyelenggara jalan awam yang dipersoalkan responden-responden dengan itu telah gagal

untuk menjalankan tugas statutori mereka di bawah s 7(2) Akta (lihat perenggan 21 & 23).

(4) Keperluan pertama tort kecuaian adalah kewujudan undang-undang terhadap keadaan kewajipan berhati-hati, iaitu satu di mana undang-undang mengepilkan bersama-sama liabiliti untuk kecuaian. Keperluan ini telah dengan jelas dipenuhi berikutan ss 5 dan 7(2) Akta yang mengenakan kewajipan berhati-hati statutori ke atas responden-responden. Keperluan kedua adalah mesti terdapat tingkah laku cuai oleh responden-responden. Keperluan ketiga adalah mesti terdapat kaitan sebab di antara tingkah laku cuai responden-responden dan ganti rugi. Dan keperluan keempat adalah elemen kebolehramalan bahawa kecuaian sedemikian akan menyebabkan perayu mengalami jenis ganti rugi yang diadukannya. Keperluan kedua hingga keempat adalah soalan fakta, yang mana atas fakta dan keterangan yang tidak dipertikaikan dipenuhi atas imbangan kebarangkalian. Secara keseluruhannya, responden-responden adalah cuai kerana gagal untuk memperbaiki lubang-lubang dengan cepat walaupun mempunayi pengetahuan terlebih dahulu mengenainya, dan tindakan cuai yang mana membawa kepada perayu jatuh ke dalam lubang-lubang dan oleh itu mengalami kerugian dan ganti rugi (lihat perenggan 29–30).]

Notes

For a case on local authority, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1650.

For a case on proceedings against government, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 76.

Cases referred to

Burton v West Suffolk County Council [1960] 2 All ER 26, CA (refd)

Bux v Slough Metals Ltd [1974] 1 All ER 262; [1973] 1 WLR 1358, CA (refd)

Goodes v East Sussex CC [2000] 3 All ER 603, HL (distd)

Gorringe v Calderdale Metropolitan Borough Council [2004] 2 All ER 326, HL (distd)

London Passenger Transport Board v Upson and another [1949] AC 155, HL (refd)

McClelland v Manchester Corporation [1912] 1 KB 118, KBD (not folld)

Moul v Croydon Corporation and another [1918–19] All ER Rep 971, KBD (refd)

Renugavathi Chinatamby v Belati Wangsa (M) Sdn Bhd [2010] 6 CLJ 820, HC (refd)

Thompson v Bradford Corporation and another [1914–15] All ER Rep 1176, KBD (refd)

Wilson v Kingston-Upon-Thames Corporation [1949] 1 All ER 679, CA (refd)

Wolverhampton New Waterworks Co v Hawkesford (1859) 6 CBNS 336 (refd)

Legislation referred to

Government Proceedings Act 1956 ss 2(2), 5, 7, 7(1), (2), (3)
Highways Act 1980 [UK] s 41(1)

Appeal from: Civil Appeal No 11B-70–10 of 2014 (High Court, Pulau Pinang)

Shuroma Guha Thakurta (Manjit & Co) for the appellant.
Aliza Sulaiman (Legal Advisor, Pulau Pinang State Legal Advisor's Office) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] On the morning of 2 September 2009 at about 7.45am, the plaintiff was riding his motorcycle to work along Jalan Perusahaan, Bukit Minyak, Pulau Pinang when he suddenly fell into two contiguous potholes measuring approximately 1.4 metres and 1.6 metres in diameter respectively. In the process, the plaintiff was thrown off his motorcycle and sustained injuries.

[2] On 16 August 2012, the plaintiff filed a claim for damages for negligence against Jurutera Daerah, Jabatan Kerja Raya, Seberang Perai Tengah ('the first defendant'), Pengarah Jabatan Jabatan Kerja Raya, Pulau Pinang ('the second defendant') and Kerajaan Negeri Pulau Pinang ('the third defendant').

DECISION OF THE MAGISTRATE'S COURT

[3] The plaintiff's claim was dismissed by the magistrate after a full trial on three main grounds. First, the plaintiff's version was inconsistent with the damage to the plaintiff's motorcycle. Second, another person riding motorcycle registration No PHD 122 had also fallen into the same potholes 15 minutes earlier at 7.30am on the same morning. The plaintiff failed to call the rider of that motorcycle to corroborate his version of the accident. Third, the defendants are protected under sub-s 7(1) of the Government Proceedings Act 1956 ('the GPA 1956'). The magistrate also held that sub-s 7(3) of the GPA 1956 did not apply as the potholes were not due to the defendants' negligence in the execution of maintenance of the roads.

[4] Dissatisfied with the decision of the magistrate, the plaintiff appealed to the High Court.

A FINDINGS OF THE HIGH COURT

[5] On 30 January 2015, the learned judicial commissioner ('JC') dismissed the plaintiff's appeal. In his judgment, the learned JC premised his decision on two main issues. On the first issue, the learned JC reversed the magistrate's finding that the plaintiff's motorcycle did not fall into the potholes. The learned JC found that the magistrate was incorrect in her assessment and evaluation of the evidence in concluding that the motorcycle did not fall into the potholes. The fact that the plaintiff's motorcycle fell into the potholes is corroborated by the damage to the front rim of the motorcycle's tyre. Further, the existence of the potholes was confirmed by investigation officer Sgt Syed Fauzi (PW1). We also note that the defendants did not appeal against the learned JC's finding that the plaintiff's motorcycle fell into the potholes. In this regard, we are satisfied that the learned JC's finding is consistent with the evidence on record.

[6] On the second issue, the learned JC found that: (i) the plaintiff failed to prove that the defendants were negligent within the perimeters of sub-s 7(3) of the GPA 1956; and (ii) the defendants are protected under sub-s 7(1) of the GPA 1956 for any omission or refusal to maintain the road which was in a state of disrepair due to the two potholes. In essence, the learned JC agreed with the findings of the magistrate that the basis of the plaintiff's claim was not the result of the negligence of the defendants in the execution of any works of construction or maintenance in the exercise of their public duties. The learned JC found that 'the condition of the road with the potholes was due to nonfeasance by leaving the road alone and it gets out of repair and not due to misfeasance where the defendants repaired the road negligently. The said potholes were caused by the heavy vehicles that plied on Jalan Perusahaan and any omission or refusal by the government to construct or maintain road shall not be held against the government as per s 7(1) of the Government Proceedings Act 1956'.

[7] The learned JC relied on the common law principle stated in *McClelland v Manchester Corporation* [1912] 1 KB 118 at p 127 as follows:

> If a highway authority therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensue. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some precaution which, if taken, would have made the work done sage instead of dangerous.
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> You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once established that the local authority did something to the road and the case is removed from the category of non-feasance. If

the work were imperfect and incomplete it became a case of misfeasance and not non-feasance, although damage was done by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the something on its legal consequence as the commission of something in point of law between such a case and a case where the local authority have chosen to do nothing at all.

[8] The learned JC opined that read together, sub-ss 7(1) and (2) of the GPA 1956 provides that the government or its officers in the exercise of the public duties in the construction and maintenance of roads shall not be liable for any non-feasance.

SUBMISSION OF THE PARTIES

[9] Learned counsel for the appellant argued that the maintenance of roads by the defendants require them to keep the roads in the same state or in good condition. This includes repairing and supervising the road condition at regular intervals. If pot holes occur, the defendants are duty bound to effect prompt repairs to restore the roads in good condition. If having discovered the pot holes and the defendants fail to carry out maintenance works the defendants would be negligent within the meaning of sub-s 7(3) of the GPA 1956. In this case, the fact that the defendants were well aware of the existence of the pot holes in question is not disputed. It is also not disputed that the defendants did not carry out any repair works of the potholes; as such, learned counsel argued that the defendants were negligent by their act of omission.

[10] In reply, learned state legal advisor ('SLA') argued that there is no error in law to justify appellate intervention against the findings of the High Court. The magistrate's court and High Court have made concurrent findings of fact. Firstly, the defendants have carried out their public duties when they carried out road inspections twice a month. The road in question is located in an industrial area and is frequently used by lorries and heavy vehicles. As such, pot holes are liable to occur from time to time. Second, the defendants are protected by statutory immunity under s 7 of the GPA 1956. No action can be brought against the defendants on the ground that the defendants did not make any repairs to the pot holes. In order to attract liability there must be a positive act on the part of the defendants (*Thompson v Bradford Corporation and another* [1914–15] All ER Rep 1176; *Moul v Croydon Corporation and another* [1918–19] All ER Rep 971; *Burton v West Suffolk County Council* [1960] 2 All ER 26 ; *Wilson v Kingston-Upon-Thames Corporation* [1949] 1 All ER 679; *Goodes v East Sussex CC* [2000] 3 All ER 603; *Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326; *Renugavathi Chinatamby v Belati Wangsa (M) Sdn Bhd* [2010] 6 CLJ 820).

A OUR DECISION

[11] In our view, the central question to be determined in this appeal is this: Whether the defendants are liable in negligence for their failure to keep a road known as Jalan Perusahaan which is under their maintenance in good repair pursuant to sub-s 7(3) of the GPA 1956?

[12] In this regard, it is pertinent to set out the following undisputed facts:

(a) the road in question is under the care and maintenance of the defendants;

(b) the potholes in question are the same potholes in which another motorcycle rider fell into on 2 September 2009 at about 7.30am and thereby sustained injuries and loss and damage;

(c) there was no warning signs or cones placed near the potholes to warn road users of the potholes;

(d) the witness for the JKR agreed in cross-examination that the JKR conducted two road inspections a month and that they would have noticed the potholes;

(e) the defendants were well aware of the existence of the potholes long before the accidents occurred; and

(f) the defendant did not take any action to repair the potholes; the witness for the JKR agreed in cross-examination that the defendants were negligent in not repairing the potholes.

Liability for breach of statutory duty

[13] At common law, a statutory duty frequently gives rise to a liability to a civil action (*Bux v Slough Metals Ltd* [1974] 1 All ER 262; [1973] 1 WLR 1358; *London Passenger Transport Board v Upson and another* [1949] AC 155). There are three categories of liability arising out of a breach of statutory duty. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there the party can only proceed by action at common law. The third class is where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it (*Wolverhampton New Waterworks Co v Hawkesford* (1859) 6 CBNS 336 at p 356).

[14] In this regard, it is pertinent to refer to the provision of ss 5 and 7 of the GPA 1956 which read as follows:

> 5 Liability of the Government in tort
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> Subject to this Act, the Government shall be liable for any wrongful act done *or neglect or default committed by any public officer* in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government. (Emphasis added.)
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> 7 Savings of acts done in exercise of public duties
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> (1) Notwithstanding any other provisions of this Act to the contrary no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government.
>
> (2) For the purposes of subsection (1) the expression '*exercise of the public duties*' includes —
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> a) the construction, *maintenance*, diversion and abandonment of railways, *roads*, bridle-paths or bridges;
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> b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;
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> c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and
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> d) the maintenance, diversion and abandonment of the channels of rivers and waterways.
>
> (3) *Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence* or trespass in the execution of any works of construction or *maintenance undertaken by the Government in the exercise of the said public duties*.
>
> (4) Nothing in this Act shall subject the Government, in its capacity as a highway authority, to any greater liability than that to which a local authority is subject in that capacity. (Emphasis added.)

[15] In our view, the common law right to bring an action for negligence for breach of statutory duty has been accorded statutory recognition under the GPA 1956; and that the liability which has been established falls under the third class of cases — ie where the statute (the GPA 1956) creates a liability which does not exist at common law, ie liability for acts of nonfeasance on the part of the government in the exercise of its public duties.

[16] The word 'neglect' is defined as 'fail to give proper care or attention to' or 'fail to so something' (*Concise Oxford English Dictionary* (11th Ed) Revised 2008). We are of the view that on the true construction of s 5 and sub-s 7(3), the liability of the government for any 'neglect' by any public officer under s 5 should be read in conjunction with sub-s 7(3) which provides for the bringing of any action for damages arising out of negligence.

[17] Section 7 of the GPA 1956 makes it clear that the maintenance of public roads is one of the public duties of the defendants. As it is not disputed that the road in question is under the care and maintenance of the defendants, it follows that the defendants are under a public duty to maintain the public road in question within the meaning of sub-s 7(2) of the GPA 1956. A public duty which is imposed upon the defendants under the GPA 1956 is in the nature of a statutory duty; a statutory duty is defined as any duty imposed by any written law (sub-s 2(2) of the GPA 1956). In other words, the maintenance of public roads is the defendants' statutory duty.

[18] What is not defined under the GPA 1956 is the word 'maintenance'. In this case, the action by the plaintiff against the defendants is for negligence and not for breach of contract. We do not think that the defendants can rely on sub-s 7(1) to argue that no proceedings shall lie against them on account of their act or omission in the exercise of their public duties.

[19] The main thrust of the plaintiff's case is that in the exercise of their public duties in the maintenance of the public roads, the defendants were negligent. Subsection 7(3) of the GPA 1956 expressly stipulates that a suit for damages arising out of negligence in the execution of any works of construction or maintenance may be brought against the defendants. Does the plaintiff's suit fall within the ambit of this subsection?

[20] Learned SLA arguing for the defendants said that there must be a positive act to attract liability; that there must have been maintenance works in progress at the time of the accident. Put another way, it is the defendant's argument that they will only be negligent if at the time of the accident, they were carrying out maintenance works at the place of incident; and that as they were not carrying out any maintenance works, therefore they cannot be liable. Their argument is premised on the interpretation of the words 'in the execution of any works of construction or maintenance' in sub-s 7(3) which posits that the words 'in the execution of any works of' also applies to 'in the execution of any works of maintenance'; arguing therefore that the words should be read conjunctively.

[21] In our considered view, on a plain reading of sub-s 7(3) it is clear that the words 'construction' and 'maintenance' contained in the phrase 'in the

execution of any works of construction *or* maintenance' is disjunctive. The word 'or' expressly delineates and distinguishes the expression 'works of construction' and 'maintenance'. A

[22] Maintenance has been defined as the act of maintaining something (*Oxford Advanced Learner's Dictionary*); the act of maintaining, the state of being maintained, the upkeep of property or equipment (*Merriam Webster's Collegiate Dictionary* (10th Ed); the process of maintaining or the state of being maintained (*Concise Oxford English Dictionary* (11th Ed, Revised 2008)). It appears that maintenance is not a static but it is an active and on-going process of maintaining something. B C

[23] In the context of the present case, the maintenance of public roads includes the act of maintaining ie the act of keeping the public roads in good repair and condition by conducting regular inspections and necessary repairs. It goes without saying that keeping public roads in good repair and condition also goes toward ensuring that the public roads do not pose any danger to road users. Indeed, under the GPA 1956 it is the defendants' statutory duty to construct and maintain public roads which are intended for the use of the general public. Accordingly, the maintenance of public roads includes the regular inspection of public roads and the act of carrying out timeous and prompt repair and maintenance works to keep the public roads in good repair and condition. It follows that where as in this case, notwithstanding the defendants' knowledge of the existence of the potholes the defendants failed to promptly repair the potholes and thereby left the public road in a state of disrepair. Of particular significance is the defendants' stated position that the public road in question is a busy thoroughfare used by heavy vehicles including lorries, buses and prime movers. Given the defendants' stand, it is incumbent upon the defendants to conduct regular inspections and effect timeous and prompt repair to the pot holes to reduce the risk of danger to road users. As such, the defendants in failing to maintain the public road in question have failed to discharge their statutory duty under sub-s 7(2) of the GPA 1956. D E F G

[24] Therefore, even if the said words 'construction' and 'maintenance' in sub-s 7(3) can be read conjunctively, it is clear that on the settled facts the defendants were negligent in failing to repair the potholes timeously and promptly to the detriment of public road users such as the plaintiff. There was a direct causal link between the breach of the statutory duty and the loss and damage suffered by the plaintiff — ie the existence of the two potholes lying in the public road, the defendants' prior knowledge of the existence of the potholes, the failure of the defendants to maintain and repair the potholes timeously, the plaintiff falling into the potholes and the loss and injury thereby sustained. H I

[25] By reason of the foregoing, we are constrained to hold that the learned judge erred in law in relying on the common law principle in *McClelland v Manchester Corporation*. In our view, the common law principle is not applicable in the light of the express provisions of ss 5 and 7(3) of the GPA 1956. As such, the distinction between acts of misfeasance (defined as transgression, especially the wrongful exercise of lawful authority) which attracts liability and an act on nonfeasance (defined as the failure to perform an act that is required by law; failure or omission to do something that should be done or especially something that one is under a duty or obligation to do) which does not attract liability is not applicable.

[26] We will now advert to the cases cited by learned SLA for the defendants. *Goodes v East Sussex CC* and *Gorringe v Calderdale Metropolitan Borough Council* are distinguishable on the facts. In *Goodes*, the plaintiff's car skidded on a patch of black ice. He claimed damages against the defendant highway authority, contending that the authority ought to have prevented the formation of ice by gritting the road and that its failure to do so constituted a breach of its duty under s 41(1) of the Highways Act 1980 to 'maintain the highway'. The House of Lords held that on the true construction of s 41(1) of the Act, a highway authority's duty to maintain the highway did not extend to keeping it free from ice. In *Gorringe*, the plaintiff suffered serious injury driving a motor car on a country road when, just short of a crest in the road, she braked sharply and skidded into the path of a bus coming from the opposite direction. The plaintiff argued that the authority's failure to place on or near the road sufficient signs giving warning to motorists that they were approaching a dangerous part of the road constituted a breach of its duty as highway authority under s 41(1) of the Act to 'maintain the highway'. The House of Lords held that the duty to 'maintain the highway' did not include a duty to take reasonable care to secure that the highway was not dangerous to traffic. Further the accident had not been caused by any defect on the state of repair of the road or by any failure of the authority to maintain the road. It was also held that the existence of the broad public duty under the Highway Act 1980 did not generate a common law duty of care and thus a private right of action.

[27] In *Thompson v Bradford Corporation & Anor*, the plaintiff was entitled to damages for negligence against the corporation because turning part of the footpath into a roadway was equivalent to making it into a new road and the failure of the corporation to see that the road was fit for the traffic intended to use it was an act of misfeasance and not nonfeasance. In *Moul v Croydon Corporation & Anor*, the defendants were held not liable as the lack of repair of the road arose from nonfeasance and not from misfeasance. In *Burton v West Suffolk County Council*, the defendants were held not liable because: (i) the fact that the drainage work was done by the defendants was inadequate was not misfeasance on their part; and (ii) there was no duty on the defendants to give

warning of ice on the road. In *Wilson v Kingston-Upon-Thames Corporation*, the court held that the lack of repair of the highway arose from nonfeasance and not from misfeasance in repairing the road negligently, and therefore, the highway authority were not liable

[28] In our view, the above-mentioned cases cited by learned SLA the English courts relied on the common law principle in *McClelland* which we have said are not applicable in the light of the GPA 1956. As such, the cases are distinguishable on the facts and the law. Firstly, there is no equipollent ss 5, 7(2) and 7(3) of the GPA 1956 in the English cases which specifically provides that a claim for damages for negligence may be brought against the defendants. Secondly, the distinction between misfeasance and nonfeasance is not applicable in this case. As such, the cases are of no aid to the defendants' case.

[29] It is settled law that there are six requirements of the tort of negligence. The first four requirements must be satisfied before the court proceeds to consider the fifth and sixth requirements; viz, the extent of the responsibility for the damage to be apportioned to the defendants where others are also held responsible and the monetary estimate of the extent of the damage (*Clerk & Lindsell on Torts* (17th Ed) at p 219). The first requirement is the existence in law of a duty of care situation, ie one in which the law attaches liability to carelessness. In our view, this requirement has been clearly satisfied pursuant to ss 5 and 7(2) of the GPA 1956 which imposes a statutory duty of care on the defendants. The second requirement is that there must be careless behaviour by the defendants, ie that they failed to measure up to the standard and scope set by law. The third requirement is that there must be a causal connection between the defendants' careless conduct or neglect and the damage. And the fourth requirement is the element of foreseeability that such conduct or neglect would have inflicted on the plaintiff the kind of damage of where he complains. The second to the fourth requirements are questions of fact, which on the undisputed facts and evidence are satisfied on the balance of probabilities.

[30] For the reasons adverted to above, we are constrained to hold that the learned JC erred in law and in fact in finding that: (i) the plaintiff failed to prove that the defendants were negligent within the parameters of sub-s 7(3); and (ii) the defendants are protected under sub-s 7(1) of the GPA 1956 for any omission or refusal to maintain the road which was in a state of disrepair due to the two potholes. In our view, the distinction drawn by the learned JC between misfeasance and nonfeasance is a misdirection in law. What is determinative is the construction to be given to sub-s 7(3), and in particular to the meaning of the word 'maintenance'. In consequence, we are of the view that the defendants were negligent in failing to carry out timeous repair to the potholes despite having prior knowledge of the same, and which said act of neglect led to the plaintiff falling into the potholes and thereby sustained loss and damage.

[31] For the foregoing reasons, we affirm that part of the learned JC's finding that the plaintiff's motorcycle fell into the potholes. We set aside that part of the learned JC's decision dismissing the claim on the ground that negligence was not proven under sub-s 7(3) of the GPA 1956 and that the condition of the road with the potholes was due to nonfeasance. In consequence, we allowed the appeal with costs.

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar